THE HON'BLE MR JUSTICE J.CHELAMESWAR

and

THE HON'BLE MR JUSTICE M.VENKATESWARA REDDY

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WP Nos. 9422 & 9552 of 2005

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COMMON ORAL ORDER : (per JC,J)

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These two writ petitions are filed by the respondents in OA Nos.11307 of 2002 and 4495 of 2004 on the file of the Andhra Pradesh Administrative Tribunal. OA No.4495 of 2004 was allowed by an order of the Andhra Pradesh Administrative Tribunal dated 21.4.2005. As the issue involved is the same, OA No.11307 of 2002 also came to be disposed of in the same way in terms of the decision in OA No.4495 of 2004.

The parties are referred to in this judgment as they are arrayed in the OAs. The applicant in OA No.11307 of 2002 is appointed as a Regional Transport Officer by direct recruitment some time in the year 1990 and the applicant in OA No.4495 of 2004 was appointed as a Regional Transport Officer by promotion from the post of Motor Vehicle Inspector some time in the year 1997. The unofficial respondents in the above mentioned two OAs who are the writ petitioners before us were recruited by transfer as Regional Transport Officers from the service of the Secretariat, which is governed by the Rules called the Andhra Pradesh Secretariat Service Rules. Prior to their appointment as Regional Transport Officers, some of them were working as Section Officers and the others were working as Private Secretaries to the Secretaries of the Government of Andhra Pradesh.

The post of Regional Transport Officer is one of the posts, which is part of a service called the “Andhra Pradesh Transport Service”. The constitution, method of appointment etc., of the said service are governed by a set of Rules

called the Andhra Pradesh Transport Service Rules, 1990 framed by the Government of Andhra Pradesh, in exercise of the power conferred under Article 309 of the Constitution. Rule 3 of the said Rules postulates the method of appointment to the post of Regional Transport Officer as follows:

"Rule 3. Method of appointment :- (a) Subject to the other provisions in these rules, the method of appointment for the several categories shall be as follows :

1.	Xxx		
2.	Xxx		
3.	Xxx		
4.	Regional Transport Officer	(i)	By direct recruitment
		ii.	By promotion from category 5.
		iii.	By recruitment by transfer from among :
			a. Superintendents/Special Category Stenographers in A.P.Ministerial Service of the Office of the State Transport Authority.
			b. Superintendents in A.P. Ministerial Service of the Subordinate Offices of Transport Department.
			c. Section Officers/Private Secretaries to Secretaries to Govt. of the Secretariat Dept. except Finance and Planning (Finance Wing)/Law and Legislative Departments."

It further stipulates that such appointment, either by promotion or by transfer, is required to be made in a unit of ten vacancies in the following manner :

"(b) Appointment by direct recruitment and by promotion or by recruitment by transfer to the category of Regional Transport Officers shall be made in a unit of ten vacancies as follows :

1st vacancy : Promotion from Motor Vehicle Inspectors

2nd vacancy : By recruitment by transfer from the
category of Supdts/Special Category
Stenographers in Andhra Pradesh
Ministerial Service of the Office of the State
Transport Authority.

3rd vacancy : Direct recruitment

4th vacancy : By recruitment by transfer from the
category of Section Officers/Private
Secretaries to Secretaries to Government of
the Secretariat Departments except Finance
& Planning (Finance Wing) Department,
Law and Legislature Department.

5th vacancy : By recruitment by transfer from the
category of Supdts. In Andhra Pradesh
Ministerial Service of the Subordinate Offices of the Transport Department of the
concerned Multizone.

6th vacancy : By promotion from Motor Vehicle
Inspectors.

7th vacancy : Direct recruitment

8th vacancy : By recruitment by transfer from the
category of Supdts. in Andhra Pradesh
Ministerial Service of the Subordinate
Offices of the concerned Multizone.

9th vacancy : By promotion from Motor Vehicle

Inspectors.

10th vacancy : Direct recruitment."

The said Rule insofar as it provided for recruitment by transfer to the post of Regional Transport Officer was challenged unsuccessfully earlier. Eventually, the Supreme Court repelled the challenge in a case in **GOVT. OF A.P. AND ANOTHER V. B.SATYANARAYANA RAO (DEAD) BY LRS.** The substance of the challenge in the said decision was that such a provision for recruitment by transfer is violative of the Presidential Order issued pursuant to Article 371-D titled as "The Andhra Pradesh Public Employment (Organisation of Local Cadres and Regulation of Direct Recruitment) Order, 1975 (for short `Presidential Order).

The Supreme Court in the said Judgment followed an earlier decision of the Court in **STATE OF A.P. V. V.SADANANDA ,** wherein a similar question was considered.

However, a similar provision, which enabled the posts of Assistant Inspector of Labour to be filled up through the recruitment by transfer of the UDCs of the Labour Department and Factories Department, was challenged and the legality of the relevant Rule was considered by the Supreme Court in a case in **V.JAGANNADHA RAO V. STATE OF A.P..** Once again, on the same ground the Supreme Court sustained the challenge and declared that such a provision violates the Presidential Order. In the process, the Supreme Court had to consider the two decisions referred to earlier and came to the conclusion that the above mentioned two decisions did not lay down the correct legal position. It is necessary to mention here while the above mentioned two decisions were rendered by Division Benches consisting of two Judges each, **JAGANNATHA RAO'S CASE (3 supra)** was decided by a Bench consisting of three Judges.

Armed with the declaration of law by a bigger bench of the Apex Court, the applicants approached the Administrative Tribunal by way of the above mentioned OAs from out of which these writ petitions arise.

The prayer in the OAs, in substance, is that in view of the declaration of law made by the Supreme Court in **JAGANNADHA RAO's** case **(3 supra)**, the continuance of the writ petitioners herein in the posts of Regional Transport Officers, is illegal. The submission was accepted by the Tribunal. Hence, these writ petitions**.**

The learned counsel for the petitioners, Sri Nuty Ram Mohan Rao, argued that: Rule 3 of the A.P. Transport Service Rules, 1990 was challenged earlier on the ground that it violates the Presidential Order, the matter went up to the Supreme Court and the constitutionality of the said Rule was upheld in **SATYANARAYANA RAO's case (1 supra)**, the petitioners were appointed as Regional Transport Officers in accordance with the above mentioned Rule (3) of the Rules under the third category i.e., recruitment by transfer, long before the decision of the Supreme Court in **JAGANNADHA RAO**'s case. The declaration of law made by the Supreme Court in the said case that **SATYANARAYANA RAO**'s case did not lay down the correct principle of law, is *per incurium* and at any rate cannot be invoked to unsettle the transactions that took place not only long before the declaration of law made by the Supreme Court in **JAGANNDHA RAO**'s case but also consistent with the declaration of law made by the Supreme Court in **SATYANARAYANA RAO**'s case.

The other submission made by the learned counsel is that in **SATYANARAYANA RAO**'s case, the Supreme Court only followed the principle laid down by it earlier in **SADANANDA**'s case **(2 supra).** Therefore, the legal position that held the field for a period of almost one and half decades ought not to be displaced on the basis of a latter decision of the Supreme Court where the issue fell for enquiry collaterally.

Lastly, the learned counsel argued that the law declared by the Supreme Court in **JAGANNADHA RAO**'s case is required to be applied prospectively.

Before we examine these submissions, it is necessary to examine the relevant provisions of the Constitution and other instruments dealing with this aspect. Under the scheme of Constitution, equality of opportunity to all the subjects of the State in every sphere of the activity of the State is the norm prescribed under Articles 14. Article 16 emphasize the norm specifically in the context of public employment.

Under Article 309 of the Constitution, the appropriate legislatures are authorised to make laws dealing with the various facets of employment under the State, such as, the method and manner of recruitment, conduct and discipline, etc. In other words, the Parliament and the appropriate State Legislatures are authorized to make laws dealing with the area of employment under the Union Government and under the State Government respectively. The Seventh Schedule of the Constitution indicates the fields of legislation assigned to either the Parliament or the Legislatures of the State. Article 246 describes the legislative competence of the above mentioned two bodies with reference to the entries contained in three lists of the Seventh Schedule. Entry 70 of List-I of the Seventh Schedule indicates the field of legislation as;

> **"Union Public Services, All India Services, Union Public Service Commission".**

Entry 41 of List-II indicates the field in the context of State Legislature as;

> **"State Public Services, State Public Service Commission".**

Article 309 further authorizes the President in the case of Union of India and the Governor in the case of a State to make appropriate Rules with regard to the employment under State until the legislature makes the law in that regard. By virtue of the declaration contained under Articles 14 and 16 of the Constitution of India, either the legislature or the executive, in exercise of the power under Article 309, is required to make a law or the Rules, as the case may be, providing equality of opportunity more specifically without any reference to or preference on the ground of religion, race, caste, sex, place of birth, residence, etc.

However, for various historical reasons, the details of which may not be necessary at this juncture, an exception to the Rule contained under Articles 14 and 16 in the context of employment under the State came to be incorporated in the Constitution by the Constitution (Thirty-second Amendment) Act 1973. The

said Act introduced a new Article 371-D to the Constitution. The said Article recognizes certain disparities among the various regions in the matter of employment under the State and authorizes the President to make appropriate orders in that regard. Article 371-D, insofar as the same is relevant for the present purpose, reads as follows:

1. The President may, by order made with respect to the State of Andhra Pradesh provide, having regard to the requirements of the State as a whole, for equitable opportunities and facilities for the people belonging to different parts of the State, in the matter of public employment and in the matter of education, and different provisions may be made for various parts of the State.

2. An order made under clause (1) may, in particular,-

(a) require the State Government to organize any class or classes or posts in a civil service of, or any class or classes of civil posts under, the State into different local cadres for different parts of the State and allot in accordance with such principle and procedure as may be specified in the order the persons holding such post to the local cadres so organized.

(b) specify any part or parts of the State which shall be regarded as the local area-

i. for direct recruitment to posts in any local cadre (whether organized in pursuance of an order under this article or constituted otherwise) under the State Government;

ii. for direct recruitment to posts in any cadre under any local authority within the State; and

iii. xxxxxx.

(c) specify the extent to which, the manner in which and the conditions subject to which, preference or reservation shall be given or made-

i. in the matter of direct recruitment to posts in any such cadre referred to in sub-clause (b) as may be specified in this behalf in the order;

ii. xxxxxxxxx.

to or in favour of candidates who have resided or studied for any period specified in the order in the local area in respect of such cadre, University or other educational institution, as the case may be.

Xxxxxxxxxxxxxxx

Xxxxxxxxxxxxxxx

Xxxxxxxxxxxxxxxx

(10) The provisions of this article and of any order made by the President thereunder shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

(Emphasis supplied)

The Article expressly authorizes the President to make different provisions for different parts of the State of Andhra Pradesh. An obvious departure for the Rule contained under Article 16 that the factum of residence of a seeker of employment under the State, is an irrelevant factor in the matter of public employment.

Pursuant to the said amendment, the President of India made the Presidential Order referred to earlier in this Judgment. The said order is divided into various paragraphs. Para 2 contains definitions of the various expressions that occur in the order. Para 3 mandates the State Government to organize classes of posts in Civil Services and classes of Civil Posts under the State into different local cadres for different parts of the State to the extent and in the manner provided thereunder. Under para 6 of the Presidential Order, the State is divided into various local areas. The description of the local area is relative to certain classes of posts, expressly enumerated under para 6. Broadly, the local areas are the District, (which is once again defined to be the revenue district) zones specified in Schedule-II to the order. Para 8 mandates that a certain percentage of posts are required to be reserved in favour of local candidates in the matter of direct recruitment to the various posts enumerated in the para. The percentages vary depending upon the class of the post. As a broad Rule, we can state the higher the post in the hierarchy of the administration, the percentage of the reservation is lesser. The minimum percentage prescribed is 60 and the maximum is 80. Para 7 lays down the principles, by which the question whether a candidate is a local candidate with reference to any particular post or not is to be decided. We are not concerned in the present case with the other provisions of the Presidential Order except para 14 of the Order which reads as follows:

"**Para 14. Saving –** Nothing in this Order shall apply to –

a. any post in the Secretariate of the State Government

b. any post in an Office of the Head of a Department;

c. any post in a Special Office or Establishment;

d. Any post in a State-level office or institution;

e.	Any post other than a post belonging to any of the non-gazetted categories in the ministerial and technical services in a Major Development Project; and
f.	Any post of Police Officer as defined in clause (b) of Section 3 of the Hyderabad City Police Act, 1348 F.

In substance, para 14 says, with reference to the various posts enumerated in para 14, the Presidential Order has no application. In other words, the requirement of filling up of those posts on the basis of a reservation in favour of the local candidates is not made applicable.

An analysis of the language of Article 371-D and para 8 of the Presidential Order makes it clear that the reservation provided (in favour of the local candidates) therein is confined only to the process of filling up of a post by direct recruitment.

The long history of services under the State in this country, undoubtedly, demonstrates that there is more than one method of filling up of a post under the State. Filling up of a post can either be by way of a direct recruitment i.e. recruitment from open market of eligible candidates, (2) filling up of the posts by way of promotion from an inferior post to a superior post, and (3) filling up of a post by transfer of an employee from one particular class of post to another (See **RAMPRAKASH v. STATE OF HARYANA AIR 1993 SC 1974**) . Strictly, such a mode of filling up is not called a promotion in the jargon of service law as the expression 'promotion' is always used in service law to indicate an appointment to a higher post from a lower where both the posts are created and governed under the same set of Rules constituting one service. Recruitment by transfer, though factually it can be called a 'promotion' in the sense that the post to which the recruitment is made normally carries a higher status in terms of emoluments and other benefits attached to it.

The post of Regional Transport Officer is classified as a multi-zonal post. The expressions either 'multi-zone' `multi-zonal post' are not defined either in the Presidential Order or under the Constitution, but it is in vogue as indicative of a post contemplated under para 3, sub-para (5) of the Presidential Order. The said sub-paragraph enables the State Government whenever it considers

expedient to organize the post referred to in sub-paragraphs (3) and (4) of the para 3 which are otherwise required to be organized into cadres with reference to the zones specified in Schedule-II to be organized unit-wise consisting of more than one or two contiguous zones. Such units organized under para 5, popularly came to be called as multi-zones and the State of A.P., in fact, organized the State with reference to some of the posts into two such multi-zones comprising zones I to IV, mentioned in the Second Schedule into multi zone I and zones V and VI in multi-zone II.

The learned counsel for the petitioner, Sri Nuty Ram Mohan Rao argued that the Presidential Order carves out an exception to the Rule contained under Articles 14 and 16, thereby relieving the State of its obligation to accord equal treatment to all its citizens unmindful of their birth, place of birth etc. It enables the State to take the geographical relationship of a person to a part of the State as a criterion in the matter of employment under the State. He further argued that the Presidential Order does not impose any fetter on the State to make a policy choice in the matter of recruitment for public service, whether any particular post or class of posts are required to be filled either only by the mode of direct recruitment or some other legally approved mode. The various modes of recruitment indicated earlier have been approved otherwise to be constitutionally permissible modes of recruitment to service under the State. Therefore, the learned counsel argued that there is no obligation on the part of the State to resort exclusively to direct recruitment ignoring the other well-established modes of recruitment i.e., recruitment by promotion and recruitment by transfer. The Presidential Order does not either expressly or by necessary implication stipulate otherwise. In the absence of any such stipulation, Rule 3 of the A.P. State Transport Rules, 1990, which provides for the three modes of recruitment to the posts of Regional Transport Officers cannot be categorized to be a Rule (insofar as it provided for a recruitment by transfer) conflicting with the mandate of the Presidential Order.

The learned counsel submitted that the petitioners, who were initially appointed to various posts, the details of which are mentioned earlier, governed by the A.P. Secretariat Service Rules are also made eligible by Rule 3 of the A.P. Transport Service Rules, 1990 to compete for the appointment to the post of Regional Transport Officer. In view of the express provision contained in para

14 of the Presidential Order, the special scheme contained in the Presidential Order has no application in the matter of recruitment to the various posts indicated in para 14 of the Presidential Order. The fact that the petitioners do not belong to a service which is subject to the regime of the Presidential Order does not disqualify them from being considered for appointment to some other post which is subject to the regime of the Presidential Order by the mode of recruitment by transfer.

The learned counsel therefore argued that there is neither any illegality nor unconstitutionality in continuing the petitioners in the post of RTOs. The learned counsel further submitted that the decision of the Supreme Court reported in **V.SADANANDA**'s case **(2 supra)**, which was followed by later Bench in **B.SATYANARAYANA RAO**'s case **(1 supra)** laid down the correct principle of law and the decision of the Supreme Court in **V.JAGANNADHA RAO**'s case **(3 supra)** is *per incuriam*, and therefore, does not provide the legal basis for granting the relief sought for by the respondents herein and granted by the Tribunal.

In **V.SADANANDA**'s case **(2 supra),** the constitutionality of Rule-3 of A.P. Treasury and Accounts Subordinate Service Rules, 1963, as being inconsistent with the Presidential Order, was in issue. The said Rule provided for filling up of the posts of Head Accountants and Sub-Treasury Officers, *inter alia*, by transfer from among the U.D. Clerks in the Finance Department of the Secretariate.

The decision is required to be examined in the background of the various submissions made in the case. The State took a definite stand that making a provision for recruitment by transfer is justified under Paragraph-5(2)(a) of the Presidential Order, which submission was rejected by the Tribunal. Dealing with this aspect, the Supreme Court held at para 14 as follows:

> "14. In the first place, we must point out that the Tribunal has failed to construe Para 5(2) of the Presidential Order in its proper perspective and give full effect to the powers conferred thereunder on the State Government to make provisions contrary to the scheme of local cadres prescribed under Para 5(1). The words of sub-para (2) of Para 5 viz. nothing in this order shall prevent the State Government from making provision for" sets out the overriding powers given to the State Government under the sub-para. Such over-riding powers have been given to the State Government in express

> terms in recognition of the principle that public interest and administrative exigencies have precedence over the promotional interests of the members belonging to local cadres and zones. Since para 5(2) also forms a part of the Presidential Order, it forms part of the scheme envisaged for creating local cadres and zones. The Tribunal was, therefore, in error in taking the view that if the State Government was to exercise its powers under Para 5(2) and make provision for promotion of UD Assistants in the Directorate and Assistant Section Officers in the Secretariat to be transferred to posts in Zones I to IV, it will be the very negation of the creation of cadres and zones under Para 5(1) and it will be destructive of the scheme underlying the Presidential Order. In fact the Tribunal has realised the operative force of Para 5(2) to some extent but it has failed to give full effect to its realisation of the scope of Section 5(2). In para 12 of its judgment in R.P. No. 1595 of 1983 the Tribunal has stated that since the amended rule refers to para 5(2) of the Presidential Order "it will no longer be open to the petitioners to attack the amendment as was done in respect of the earlier amendment in the previous RP". The Tribunal has thus noticed that the amended Rule has been brought about by the Government in exercise of its powers under Para 5(2) but it has failed to draw the logical inference following therefrom."

Apart from that, the Supreme Court also held that the mode of recruitment and the category from which the recruitment to a service should be made are all matters, which are exclusively within the domain of the executive and not for the judicial bodies. At para 16, the Supreme Court held as follows:

> "**..... We need only point out that the mode of recruitment and the category from which the recruitment to a service should be made are all matters which are exclusively within the domain of the executive. It is not for judicial bodies to sit in judgment over the wisdom of the executive in choosing the mode of recruitment or the categories from which the recruitment should be made as they are matters of policy decision falling exclusively within the purview of the executive. As already stated, the question of filling up of posts by persons belonging to other local categories or zones is a matter of administrative necessity and exigency.** When the Rules provide for such transfers being effected and when the transfers are not assailed on the ground of arbitrariness or discrimination, the policy of transfer adopted by the Government cannot be struck down by Tribunals or Court of Law."

and upheld the constitutionality of the Rule in question before it.

In **B.SATYANARAYANA RAO**'s **case (1 supra)** this very Rule-3 of the of A.P. Transport Service Rules, 1990 was considered by the Supreme Court. Interestingly, in the said case, it was argued before the Supreme Court by the respondents, who successfully challenged the Rule before the Tribunal, that the decision of **V.SADANANDA**'s case **(2 supra)** was *per incuriam*, and therefore, required to be ignored. Repelling the submissions, the Supreme Court held at para 8 as follows:

> "..... In **State of A.P. v.V.Sadanandam (supra)** the controversy was exactly the same as it is here and this Court after considering paragraph 5 of the

Presidential Order of 1975 held that the Government has power to fill a vacancy in a zone by transfer."

V.JAGANNADHA RAO's case **(3 supra)** came to be decided by a Bench of three Judges as the Division Bench which heard the matter doubted the correctness of the law laid down in **V.SADANANDA**'s case **(2 supra)** and **B.SATYANARAYANA RAO**'s case **(1 supra).** At para 8 of the Judgment the Supreme Court indicated the object of Article 371-D, which is as follows:

"8. The object of enacting Article 371-D appears to be two-fold :-

(1) To promote equal development of the backward areas of the State of Andhra Pradesh, so far as to secure balanced development of the State as a whole.

(2) To provide equitable opportunities to different areas of the State in the matter of education, employment and career prospects in public service."

The Supreme Court then analysed the scheme of paras 3 and 5 of the Presidential Order and came to the conclusion that expression `transfer' occurring in para 5(2) of the Presidential Order did not comprehend within its sweep recruitment by transfer. The Court held at para 12 as follows:

"12. We find that para 5(2) of the Presidential Order speaks of transfer and not of promotion. It would be hazardous to accept the contention of the appellants that promotion is included in the expression 'transfer' and no assistance can be availed from the distinction made in para 5(1) of the Order. No provisions or word in a statute has to be read in isolation. In fact, the statute has to be read as a whole. A statute is an edict of the legislature. It cannot be said that without any purpose the distinction was made in para 5(1) between transfer and promotion and such distinction was not intended to be operative in para 5(2).

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We, therefore, find no reasons to accept this stand of the appellant that the expression "transfer" takes within its scope a promotion."

The Supreme Court further went on to discuss the correctness of the principle laid down in **V.SADANANDA**'s case **(2 supra)** and came to the conclusion that **V.SADANANDA**'s case **(2 supra)** did not lay down the correct principle of law.

The Court came to such a conclusion because, in **V.SADANANDA**'s case **(2 supra),** it was held that the Rule providing for a recruitment by transfer could be justified as a Rule, which is protected under para 5(2)(a) of the Presidential Order. It was the understanding of the State at that point of time that recruitment by transfer is also a transfer comprehended within the meaning of the expression 'transfer' occurring in para 5 of the Presidential Order. An understanding, as held by the Supreme Court in **V.JAGANNADHA RAO**'s case **(3 supra)**, which has no legal basis either in the language or in the scheme of the Presidential Order or under any other principle known to Service Law.

But **V.SADANANDA**'s case **(2 supra)** did not decide the validity of the impugned Rule therein only on that ground. Their Lordships further held that the Rule such as the one impugned (in the instant case or in the **V.SADANANDA**'s case) providing for recruitment by transfer to a post, which is otherwise subject to the discipline of the Presidential Order in the matter of direct recruitment, is a Rule providing for a mode of recruitment, obviously, other than by way of direct recruitment and, therefore, within the authority of the State a part of the policy choice of the State regarding the mode of recruitment and category from which recruitment to a particular service should be made.

The learned counsel further argued that in **V.JAGANNADHA RAO**'s case **(3 supra)** that distinction was not noticed. The authority of the State to make such a policy choice does not flow from para 5(2)(a) of the Presidential Order as projected by the State in **V.SADANANDA**'s case **(2 supra)**, but exists independent of it. Such an authority vests with the State, in view of the power granted in the State under Article 309 and the relevant entries referred to earlier. The conclusion of the Bench that such an exercise is not authorized by para 5(2)(a) of the Presidential Order, need not automatically be followed by the conclusion that the State is denuded of such a choice in the matter of policy, more particularly, in the absence of any specific restriction of such choice either in the Presidential Order or any other provision of law. The learned counsel submitted that in coming to the conclusion that **V.SADANANDA**'s case **(2 supra)** did not lay the correct legal principle, the Supreme Court ignored the scheme of Article 309 and the relevant entries in the VII Schedule.

The conclusion of the Bench in **V.JAGANNADHA RAO**'s case **(3 supra)** in this

regard is recorded in para 14, which is as follows::

> "14. In **Sadananda's case (Supra)**, while considering the legality of amended provisions of the Rules framed by the State Government and in sustaining the same, this Court was of the opinion that as the aforesaid rules had been framed under Section (3) of the Andhra Pradesh Ordinance 5 of 1983 read with paragraph 5(2)(a) of the Presidential Order, the conclusion of the Tribunal in striking down the rule is erroneous. The Court was of the opinion that mode of recruitment and category from which the recruitment to a service should be made are policy matters exclusively within the purview and domain of the executive and it would not be appropriate for judicial bodies to sit in judgment over the wisdom of the executive in Choosing the mode of recruitment or the categories from which the recruitment should be made. In our considered opinion, both the aforesaid reasons do not constitute a true interpretation of the provisions of the Presidential Order. At the outset, it may be noticed that Article 371-D (10) of the Constitution unequivocally indicates that the said Article and any order made by the President thereunder shall have effect notwithstanding anything in any other provision of the constitution or in any other law for the time being in force. **Necessarily, therefore, if it is construed and held that the Presidential Order prohibits consideration of the employees from the feeder category from other units** then such a rule made by the Governor under the proviso to Article 309 of the Constitution will have to be struck down. Then again in exercise of powers under paragraph 5(2) of the Presidential Order if the State Government makes any provision, which is outside the purview of the authority of the Government under para 5(2) of the Order itself, then @page-SC88 said provision also has to be struck down. Having construed the rules framed by the Governor under proviso to Article 309 of the Constitution from the aforesaid stand point, the conclusion is irresistible that the said rule to the extent indicated by the Tribunal is constitutionally invalid and its conclusion is unassailable. In the case in hand, the impugned provisions do not appear to have been framed in exercise of powers under paragraph 5(2) of the Presidential Order and as such the same being a rule made under proviso to Article 309 of the Constitution, the Presidential Order would prevail, as provided under Article 371-D (10) of the Constitution. Even if it is construed to be an order made under Paragraph 5(2) of the Presidential Order, then also the same would be invalid being beyond the permissible limits provided under said paragraph. In this view of the matter, the Tribunal rightly held the provision to the extent it provides for consideration of employees of the Factories and Boilers units to be invalid, for the purpose of promotion to the higher post in the Labour unit and as such we see no justification for our interference with the said conclusion of the Tribunal and the earlier judgment of this Court in **Sadanandam's case (supra)** must be held to have not been correctly decided. As a consequence, so would be the case with **Satyanarayana Rao's case (supra)**."
>
> ***(Emphasis supplied)***

The learned counsel also submitted that even if for the sake of argument it is taken that **JAGANNATHA RAO**'s case **(3 supra)** lays down the correct principle of law that in any mode of recruitment only locals are to be considered, such a requirement is only limited to 60% of the posts in the context of RTOs in view of the language of para 8 of the Presidential Order and

the remaining 40% of the posts are required to be filled up following the mandate of Articles 14 and 16 i.e., without reference to the residence or place of birth of the competing candidates. The learned counsel therefore argued that none of the above aspects were taken into consideration by the Bench which decide **JAGANNATHA RAO'S case** and therefore the said judgment is *per incurium* and therefore cannot be construed as a binding precedent or authority.

We find substantial force in the argument of the learned counsel for the petitioners, Sri Nuty Ram Mohana Rao. Untrammeled by an authority, which binds us like the decision in **V.JAGANNADHA RAO**'s case **(3 supra)**, we would have accepted the submission made by the learned counsel, but the constitutional mandate contained under Article 141 that the law declared by the Supreme Court, be binding on all Courts in the territory of India, disables us from accepting the submissions of the learned counsel.

> "……. it is our duty to follow the ……. and not to question their decision. We are not to reason why. Ours is but to do and die. …. (1971) 2 All ER P.187 at page 200)"

We, therefore, reject the submission that the decision of the Supreme Court in **V.JAGANNADHA RAO**'s case **(3 supra)** is required to be ignored in deciding the present controversy.

The last submission made by the learned counsel for the petitioners is that even if the decision in **V.JAGANNADHA RAO**'s case **(3 supra)** lays down the correct principles of law applicable to the facts of the present case, in the present case no relief such as the one given to the respondents by the Tribunal, ought to be given in view of the fact that it would lead to unsettlement of the settled rights over a period of approximately a decade.

The learned counsel argued that the principle is required to be applied prospectively to the cases arise in future, but not to the recruitments made long prior to the decision in **V.JAGANNADHA RAO**'s case **(3 supra)**. In support of his submission, the learned counsel relied upon a decision reported in **HARSH DHINGRA v. STATE OF HARYANA**, wherein the Supreme Court at para 7 of the Judgment held as follows:

"7. Prospective declaration of law is a device innovated by this Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law it is deemed that all actions taken contrary to the declaration of law, prior to the date of the declaration are validated. This is done in larger public interest. Therefore, the subordinate forums which are bound to apply law declared by this Court are also duty-bound to apply such dictum to cases which would arise in future. Since it is indisputable that a court can overrule a decision there is no valid reason why it should not be restricted to the future and not to the past. Prospective overruling is not only a part of constitutional policy but also an extended facet of stare decisis and not judicial legislation. These principles are enunciated by this Court in **Baburam v. C.C.Jacob** and **Ashok Kumar Gupta v. State of U.P**."

The abovementioned principle was in fact laid down in a case reported in **BABURAM V. C.C.JACOB** at para 5.

On the other hand, learned counsel for the respondents, Sri Panduranga Rao, relied upon a decision reported in **SARWAN KUMAR v. MADAN LAL AGGARWAL.** At para 15, their Lordships held as follows:

"15. For the first time this Court in **Golak Nath v. State of Punjab, AIR 1967 SC 1643** accepted the doctrine of "prospective overruling". It was held :AIR p.1669, para 51)

"51. As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions : (1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest Court of the country, i.e., the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the Courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its "earlier decisions" is left to its discretion to be moulded in accordance with the justice of the cause or matter before it."

The doctrine of "prospective overruling" was initially made applicable to the matters arising under the Constitution but we understand the same has since been made applicable to the matters arising under the statutes as well. Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. Invocation of doctrine of "prospective overruling" is left to the discretion of the Court to mould with the justice of the cause or the @page-SC1482 matter before the Court. This Court while deciding the **Gian Devi Anand's case (supra)** did not hold that the law declared by it would be prospective in operation. It was not for the High Court to say that the law laid down by this Court in **Gian Devi Anand's case (supra)** would be prospective in operation. If this is to be accepted then conflicting rules can supposedly be

> laid down by different High Courts regarding the applicability of the law laid down by this Court in Gian Devi Anand's case (supra) or any other case. Such a situation cannot be permitted to arise. In the absence of any direction by this Court that the rule laid down by this Court would be prospective in operation the finding recorded by the High Court that the rule laid down in Gian Devi Anand's case (supra) by this Court would be applicable to the cases arising from the date of the judgment of this Court cannot be accepted being erroneous."
>
> *(Emphasis supplied)*

We, therefore, reject the submission of the learned counsel for the petitioners for the reason that in the absence of any declaration by the Supreme Court in **V.JAGANNADHA RAO**'s case **(3 supra)** that the principle laid down therein shall be applicable prospectively, this Court would not be within its jurisdiction in refusing to apply the principle laid down in **V.JAGANNADHA RAO**'s case **(3 supra)** to the issue before us.

In the result, both the writ petitions are dismissed.

The learned counsel for the petitioners prayed that they may be granted leave to approach the Supreme Court, on an oral application under Article 134-A of the Constitution.

Heard the learned counsel for the contesting respondent.

In the circumstances, we find substance in the submission of the learned counsel for the petitioners as was also indicated earlier, and therefore, deem it a fit case to grant leave. Accordingly, the leave is granted.

In view of the grant of the leave, the learned counsel for the petitioners submitted that their status be protected for a limited period to enable them to approach the Supreme Court.

Heard the learned Government Pleader and the learned counsel for the contesting respondents.

In the circumstances, we deem it appropriate to direct the parties to maintain

status quo obtaining as on today for a period of four weeks insofar as the petitioners are concerned.

JUSTICE J.CHELAMESWAR

JUSTICE M.VENKATESWARA REDDY

10th MARCH, 2006

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Note:

Issue copy in two days

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